Supreme Court, U.S.
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No. 86-61

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COMMONWEALTH ELECTRIC COMPANY,

Petitioner,

v.

DEPARTMENT OF PUBLIC UTILITIES
OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of
Certiorari to the Supreme
Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Federal Power Act, or the Commerce and Due Process Clauses, prohibit the Massachusetts Department of Public Utilities from determining that a Massachusetts retail electric company shares responsibility with another Massachusetts retail electric company for the imprudent management of an outage at a Massachusetts nuclear plant, and from excluding from retail rates the resulting imprudently incurred costs of replacement power.

PARTIES

This Brief in Opposition is submitted on behalf of the respondent Department of Public Utilities of the Commonwealth of Massachusetts (referred to in the petition and herein as the "MDPU").

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OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (Pet. 1a-26a) is reported at 397 Mass. 361, 491 N.E. 2d 1035 (1986). The decisions of the MDPU (Pet. 27a-62a) are unreported.

JURISDICTION

The judgment and opinion of the Massachusetts Supreme Judicial Court were entered on April 22, 1986. Pet. 1a. On July 2, 1986, petitioner filed a petition for rehearing in the Supreme Judicial Court. The petition sought reconsideration of the judgment in light of this Court's decision in Nantahala Power & Light Co. v. Thornburg, No. 85-568 (June 17, 1986) (Nantahala). On July 10, 1986, the Supreme Judicial Court denied the petition for rehearing. Pet. 8.

The petition in this Court was filed on July 18, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

An accurate statement of the statutes and constitutional provisions involved in the case appears at the following pages of the petition: pages 2-3 (text of petition); pages 10a-16a (opinion of Massachusetts Supreme Judicial Court); and 63a-75a (text of pertinent federal and state statutes).

STATEMENT OF THE CASE

An accurate statement of the case appears at pages 3a-5a (opinion of the Massachusetts Supreme Judicial Court) of the petition.

REASONS FOR DENYING THE WRIT

The Supreme Judicial Court correctly held (1) that the petitioner Commonwealth Electric Company (the company) shared responsibility under state law for the increased costs caused by the mismanaged outage at the Pilgrim nuclear power plant, and (2) that the earlier filing of the power contract between the company and Boston Edison Company (Edison) with the Federal Energy Regulatory Commission (FERC) did not preclude the MDPU from imputing Edison's imprudence to the company or excluding from retail rates the replacement power costs incurred by the company during the outage. For the following reasons, the writ should be denied.

I. THE MDPU EXERCISED POWER RESERVED TO THE STATES BY THE FEDERAL POWER ACT AND THE F.E.R.C.

The primary ground for the petition is the claim that the Federal Power Act (FPA) preempts any state review of the prudence of retail electric company costs caused by the unreasonable extension of an outage at a nuclear plant which supplies its power. The company advances three points to buttress its claim of preemption: (1) the decision conflicts with the interpretation of the FPA rendered by this Court in its recent decision in Nantahala; (2) the MDPU action "challenges the congressional scheme for wholesale electric regulation"; and (3) the decision "will discourage retail electric companies from selecting one of

the valuable [wholesale] supply options endorsed by FERC." Pet. 10-17. None of these points are persuasive and the Supreme Judicial Court's rejection of the company's preemption claim is amply supported by the language and legislative history of the FPA and by FERC decisions which support state review of the prudence of a retail company's actions in purchasing electricity at wholesale.

1. The decision below does not conflict with the "filed rate" doctrine or the Court's decision in Nantahala.[1/]

1/ A remand of this case for reconsideration in light of Nantahala, as the company suggests, Pet. 20, is inappropriate in this instance. A summary remand order is appropriate only to "compel reexamination of a case" in light of intervening precedent. Henry v. City of

(footnote continued)

The "filed rate" doctrine requires that "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." Nantahala, slip. op. at 8. Unlike the claim here, the issue in Nantahala was whether the state's allocation of "entitlement power" in retail rate proceedings was inconsistent with FERC's allocation of the

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(footnote continued)

Rock Hill, 376 U.S. 776, 777 (1964). See, e.g., Eckerd Drugs, Inc. v. Brown, 457 U.S. 1128 (1982); Lane v. Smith, 457 U.S. 1102 (1982). Here, "reexamination" in light of Nantahala already has occurred. The company's petition for rehearing in the Supreme Judicial Court expressly relied on Nantahala, and that petition was denied. Pet. 8. As such, there is no practical object to a summary reconsideration order, and the company's request for remand and reconsideration therefore should be denied.

same wholesale power in a previous proceeding. Id. at 8-9. The Court found that the state order ran "directly counter to FERC's order. . . ." Id. at 15. In this case, however, no FERC order was or could have been contradicted by the action of the MDPU.

There is no doubt that FERC "clearly has exclusive jurisdiction over the rates to be charged . . . interstate wholesale customers." Nantahala, slip. op. at 13. "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." Id. However, as the court below correctly noted, "the Federal regulation of the rates for wholesale transactions is not disturbed by [state] inquiry into the prudence of a retail seller . . . in incurring particular

costs." Pet. 19a.

The company emphasizes the "trapping" effect of the MDPU order. However, "trapping" occurs only where the state's exclusion of retail costs overrides an express judgment of FERC that those costs were reasonably incurred by the buyer. Nantahala, slip. op. at 17. There is no such FERC judgment in this instance. In Nantahala, a federal-state conflict arose not because the state action affected costs related to a wholesale transaction, but because the State had attempted to negate a decision of FERC which had decided the same issue - Nantahala's entitlement to low cost power. In this case, no FERC proceeding considered how the imprudent management of the Pilgrim outage led to the company's need for replacement power. Since Edison provided

the company no power during the outage, its FERC-approved rate for sales to the company never reflected outage costs or imprudent management. For these reasons, the Supreme Judicial Court properly held that "the issue raised here could not, and should not, have been raised in an FERC rate-approval proceeding or a review of an FERC decision." Pet. 21a.

Thus the petition presents a quite different case from that considered in Nantahala. The company argues, however, that since its "need" for the replacement power arose "as a result of" the non-performance of the FERC-filed, Pilgrim I contract, and since the contract "contemplated" outages, then FERC has automatically endorsed as "reasonable" all costs of replacement power, regardless of whether mismanagement created the

"need" for the replacement power in the first place. Pet. 12-13. That argument is inconsistent with the purpose and scope of the FPA.

In enacting the FPA, Congress intended that state commissions would retain authority to exclude unreasonable costs from retail rates. Increased costs of service attributable to mismanagement fall within the scope of this authority. Likewise, mismanagement found under state law to be the shared responsibility of two retail companies does not escape state oversight simply by virtue of a contract for power between those companies. In this case, the need for replacement power may be deemed unreasonable under state review of the mismanaged outage, even though the energy not

supplied is normally sold at a FERC-approved price. See Nantahala, slip op. at 19. With regulatory authority allocated in this manner, the state's jurisdiction does not overlap FERC's authority to approve a wholesale rate as "just and reasonable" and permit a seller to charge a buyer that rate. No conflict occurs because the state's inquiry does not reexamine the wholesale rate to determine whether it reflects the reasonable costs of service of the wholesale seller.

The company raises the specter of "an ever increasing number of state proceedings seeking to establish that its citizens experienced excessive rates because of wholesale imprudence." Pet. 15. This argument overstates the terms and effects of the decisions below. The

MDPU authority affirmed by the Supreme Judicial Court is the power to review the prudence of the actions of retail companies. Indeed, the MDPU's initial findings of Edison's imprudence were entered in a retail fuel charge hearing, because Edison's power generation and retail service fall within the exclusive jurisdiction of the MDPU. Pet. 3a-5a. Thus, the imputation of imprudence in this case did not affect any FERC-established wholesale rates.

In short, there is no conflict with the FPA or Nantahala because the FPA permits the states to enforce a retail company's state law duty to secure power supplies at the lowest possible cost consistent with reliable service. See Pike County Light & Power v. Pennsylvania Public Utility Commission, 77 Pa. Commn.

268, 456 A. 2d 735 (1983).[2] Since the MDPU has not "usurped a function that Congress has assigned to a federal regulatory body," Nantahala, slip op. at 10, quoting Arkansas-Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981), the Supreme Judicial Court correctly found no preemption.[3]

2. Recent decisions of FERC expressly support state review of the prudence of a retail company's purchase of electricity at wholesale. For example, in Pennsylvania Power and Light

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2/ See also Spence v. Smyth, 686 P. 2d 597, 600-601 (Wy. 1984).

3/ The company actually concedes the lack of a conflict between the decision below and Nantahala. The company acknowledges that a question of the prudence of buyers in wholesale transactions was a "question left open in Nantahala."

(footnote continued)

Company, 23 FERC ¶ 61,006 (1983), FERC determined that "the [state regulator] has authority to evaluate the prudence of [the purchasing utility's] purchase in retail rate proceedings." 23 FERC at 61,018. As to its own authority to review the prudence of the purchase of power at wholesale, FERC has stated that the prudence of a purchasing utility in a wholesale transaction is not an issue

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(footnote continued)

Pet. 13. Nantahala refers to "cases treating the reasonableness of purchasing from a particular source of, rather than paying a particular rate for, FERC-approved power." Nantahala, slip. op. at 18-19, citing Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 77 Pa. Commn. 268, 273-274, 456 A. 2d 735, 737-738 (1983); Kansas-Nebraska Natural Gas Co. v. State Corp. Comm'n, 4 Kan. App. 2d 674, 679-680, 610 P. 2d 121, 127 (1980).

generally within the scope of those considered in reviewing the rates and terms of the sale. Pennsylvania Power and Light Company, 23 FERC ¶ 61,325 at 61,716 (1983). FERC also has stated that it considers the relevant issues before it to be limited to the question of the justness and reasonableness of the filed terms of the wholesale transaction. Id.

More recently, FERC has stated that the proper forum for the review of the wholesale purchaser's prudence is the retail rate proceeding in which the purchaser proposes to pass on to its ratepayers the costs of the power purchased at wholesale. Southern Company Services, Inc., 26 FERC ¶ 61,360 at 61,795 (1984), citing Southern Company Services, Inc.,

20 FERC ¶ 61,332 (1982).[4/] Since the FPA expressly confers on the states exclusive jurisdiction over retail rates, the review of the prudence of the wholesale purchaser falls squarely within the authority of the MDPU. See, e.g., Mass. Gen. Laws Ann. ch. 164, § 94G, Pet. 68a-75a.

The decisions of FERC demonstrate that federal regulation of wholesale rates does not encompass the questions of prudence addressed by the MDPU. If state review is foreclosed as the

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4/ In its order in Southern Company Services, Inc., FERC found that it is "not empowered to disapprove or modify a power sales agreement on the grounds that the buyer may not be making the best possible deal." 26 FERC at 61,795. See also Southern Co. Services, Inc., 28 FERC ¶ 61,349 (1984); Philadelphia Electric Co., 15 FERC ¶ 61,264 (1984).

company suggests, a regulatory gap would exist. See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 384 (1983) (Congress' purpose in FPA "to fill a regulatory gap, not to perpetuate one.") If, as the company argues, state prudence review will create regulatory tension, Congress and FERC are apparently willing to accept that consequence. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).[5/] The harmony between the decision of the Supreme Judicial Court and the decisions of FERC is a further reason

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5/ See also Arkansas Elec. Coop. v. Arkansas Public Serv. Comm'n, 461 U.S. 375, 381-382 (1983) (Court found no preemption and relied in part on a similar federal declination of jurisdiction over

(footnote continued)

to deny the petition in this case.

II. THE ABBREVIATED COMMERCE AND DUE PROCESS CLAUSE CLAIMS DO NOT INDEPENDENTLY MERIT REVIEW.

1. The company briefly argues that the decision of the MDPU violates the Commerce Clause of the United States Constitution. Art. 1, § 8, cl. 3; Pet. 18. According to the company, the MDPU has impermissibly burdened interstate commerce by "discouraging election of a wholesale supply option sanctioned by FERC." Id. The petition also raises the specter of "differing interpreta-

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(footnote continued)

wholesale rates charged by rural power cooperatives under the supervision of the Rural Electrification Administration).

tions" by different states as to their authority to deny costs "incurred as a result of FERC regulated rates. . . ." Id.

As the Supreme Judicial Court intimated, this argument is merely a recasting of the company's unsuccessful preemption argument. Pet. 21a-22a. Responding to the company's argument that interstate commerce was burdened by an "added" layer of regulation by the MDPU, the Supreme Judicial Court noted that the MDPU's "review of the prudence of retail utilities is not 'added'; the [M]DPU is the agency charged with that function, and the jurisdiction of FERC is expressly limited to exclude that function." Pet. 22a.

This holding follows the settled rule that Congress, in the exercise of its own plenary commerce power, may vitiate

the negative effect of the "dormant" Commerce Clause and "redefine the distribution of power over interstate commerce . . . [to] permit the states to regulate commerce in a manner which otherwise would not be permissible." Southern Pacific Co. v. Arizona Ex. Rel. Sullivan, 325 U.S. 761, 769 (1945). Accord, New England Power Co. v. New Hampshire, 455 U.S. 331, 339-40 (1982). Any action taken by a state within the scope of such delegated congressional authority "is rendered invulnerable to Commerce Clause challenge." Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 653 (1981).

The FPA has similarly "shifted this Court's main focus - in determining the permissible scope of state regulation of utilities - from the constitutional

issues that concerned [it] in Attleboro to analyses of legislative intent." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 379 (1983) (footnote omitted). The legislative history of the FPA demonstrates that "Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one." Id. at 384. With the constitutional question thus framed the court below properly relied upon its statutory holding as the dominant ground for rejecting the company's Commerce Clause claim.[6/] If, as the Supreme

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6/ The petition appears to acknowledge the relation between the company's preemption and Commerce Clause arguments. The company argues that interstate com-

(footnote continued)

Judicial Court correctly held, the FPA permits the states to review a retailer's prudence in making a wholesale purchase, and if the existence of a wholesale contract does not preempt a state law finding of joint responsibility of retail companies for the mismanagement of a nuclear power plant outage, then it cannot credibly be claimed that the MDPU has "burdened" interstate commerce in a way

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(footnote continued)

merce has been unduly burdened because "[w]hatever review and adjudication is necessary can be obtained through timely complaint to FERC." Pet. 18, citing 16 U.S.C. §§ 824d, 824e, 824f and 825e. While the MDPU contests this point, the company's argument demonstrates that its Commerce Clause claim merely recasts its claim under the FPA.

not contemplated by Congress.[7/]

In sum, the Supreme Judicial Court correctly held that the MDPU acted within an area congressionally reserved to the states as part of the federal regulation of electricity. See New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982). Since the company's Commerce Clause claim merely recasts its preemption argument, it presents no independent claim which merits review by the Court.

2. The company also claims that the order of the MDPU violated the company's constitutional right to due pro-

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7/ The decisions of FERC cited in Section I lend further support to the MDPU's position that Congress intended to permit state review of the prudence of retail companies in their wholesale transactions.

cess because its replacement power costs were denied without a "finding of wrongdoing" by the company, and because it was given "no meaningful opportunity to contest the findings relied upon by the MDPU." Pet. 19.

The company does not assert that these issues present a matter of national significance, or that similar claims have received uneven treatment in the lower courts.[8/] Furthermore, the company's due process claim turns upon facts which are unique to this case and decidedly un-

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8/ The Supreme Judicial Court correctly determined that West Ohio Gas Co. v. Public Utilities Commission, 294 U.S 63 (1935), "does not reach the issue whether the imprudence of Boston Edison properly can be imputed to the company in light of its own statutory responsibilities and contractual arrangements with Boston Edison." Pet. 14a.

favorable to the claim. The Supreme Judicial Court determined that the MDPU's finding of imprudent management by Edison rested on substantial evidence adduced in an extensive administrative proceeding and, further, that "[Commonwealth Electric] was offered an opportunity to participate directly in additional hearings on the issue." Pet. 14a. The record demonstrates that the company received clear and persistent notice that the MDPU intended to rely on its Edison findings and to rule on the company's potential responsibility.[9/] Even assuming that

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9/ See, e.g., M.D.P.U. 1003-G-1 (June 11, 1982) (S.J.C. App. 17); M.D.P.U. 1003-G-2 (July 2, 1982) (S.J.C. App. 29) M.D.P.U. 1003-G-3, August 19, 1982 (S.J.C. App. 35); M.D.P.U. 1003-G-5 (August 27, 1982) (S.J.C. App. 44).

the company has properly labeled and preserved a due process issue of significance, the facts unique to this case demonstrate that the Supreme Judicial Court correctly rejected the claim. See Pet. 22a.[10/]

10/ It is difficult to identify any prejudice suffered by the company from the MDPU's use of its findings in the Edison case. One who asserts a constitutional claim of an inadequate hearing must demonstrate how he would have utilized the procedure he alleges to have been denied. Codd v. Velger, 429 U.S. 624, 627-628 (1977). The company has not claimed that it would have contested the issue of Edison's imprudent management more vigorously than Edison. But even if the company had reason to doubt Edison's resolve, nothing precluded the company from intervening in the Edison case to contest the issue of prudence and thereby prevent the eventual disallowance of its own replacement power costs. Its failure to do so represents an independent ground for the rejection of the procedural claim and suggests an additional reason to deny plenary review of the due process issue.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

DEPARTMENT OF PUBLIC UTILITIES
of the COMMONWEALTH OF
MASSACHUSETTS

Respectfully submitted,

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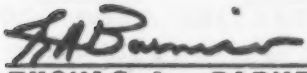

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